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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 193.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Appellant,

v.

O. N. LINDELL, Appellee.

On Certificate of the Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

This case comes to this Court under Section 239 of the Judicial Code as amended (U. S. Code, Title 28, Section 346), and involves the question whether, in an action by a carrier against a shipper to collect its charges, the shipper can interpose a counterclaim based upon the carrier's failure to perform its obligations with reference to the identical shipment on which the unpaid charges are based.

STATEMENT SHOWING JURISDICTION IN THIS COURT.

From the statement of facts in the certificate of the Circuit Court of Appeals it appears that this was an action brought in the District Court of the United States for the Southern District of California by a common carrier against a shipper for the collection of six hundred eighty-three dollars and seventy-nine cents ($683.79), of freight and other charges, in connection with the transportation of a shipment of grapes from Kingsburg, California, to Chicago. The shipper set up as a defense his loss from failure to ice and transport with reasonable dispatch in connection with the same shipment, which he claimed to be one thousand eleven dollars and seventy cents ($1,011.70). The shipper did not ask for affirmative relief, but that his loss be held to be a set-off in satisfaction of the carrier's claim for freight charges. The District Court allowed the set-off and the plaintiff appealed to the Circuit Court of Appeals. That Court has, in the certificate herein, requested of this Court instruction on the question of law involved concerning which that Court is in doubt. The question certified upon which the Circuit Court of Appeals requests instruction is as follows:

> "Where an interstate railroad carrier delivers to the consignee at destination a consignment of freight without collecting the transportation and other lawful charges, and thereafter brings an action at law to recover from the shipper the amount thereof, in a United

States court in a district where the state law provides that if a defendant omits to set up a counterclaim arising out of the transaction constituting the foundation of the plaintiff's claim he cannot thereafter maintain an action upon the same; and, further, that where such cross claims have existed 'the two demands shall be deemed compensated,' is the shipper, acting in good faith and without collusion, debarred by the Interstate Commerce Acts, particularly the Hepburn Act (34 Stat. 587), from pleading, by way of set-off, a counterclaim for a loss suffered by him as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the identical shipment?"

The jurisdiction of this Court to answer the question herein certified to it is conferred by Section 239 of the Judicial Code as amended (U. S. Code, Title 28, Section 346).

OUTLINE OF ARGUMENT.

May a shipper, when sued by a carrier for its charges, plead a counterclaim for loss and damage? The authorities are divided. Decisions of federal district courts holding this may not be done are: *Illinois Central R. R. v. William L. Hoopes & Sons,* 233 Fed. 135; *Chicago and North Western Ry. Co. v. William S. Stein,* 233 Fed. 716; *Johnson-Brown Co. v. Delaware, L. & W. R. R. Co.,* 239 Fed. 590; *Pennsylvania R. R. v. South Carolina Produce Ass'n,* 25 Fed. (2nd) 315. Decisions of federal district courts to the contrary are: *Wells Fargo Co. v. Cuneo,* 241 Fed. 727; *Chicago and North Western Ry. Co. v. E. C. Tectonius Manufacturing Co.,* 262 Fed. 715; *Payne v. Clarke,* 271 Fed. 525; *Chicago, M. & St. P. Ry. Co. v. Pioneer Grain Corp.,* 26 Fed. (2nd) 90.

Decisions of state courts denying the right to counterclaim are: *Delaware, L. & W. R. R. Co. v. Henry Nuhs,* 93 N. J. Law 309, 111 Atl. 223; *Bush v. Keystone Driller Co.,* 199 S. W. 597; *Adams Express Co. v. Albright Bros.,* 75 Pa. Sup. Ct. 410. Decisions of state courts permitting counterclaims are: *New York Central R. R. v. Federal Sugar Refining Co.,* 201 App. Div. 467, 194 N. Y. Supp. 467, reversed on other grounds, 235 N. Y. 182, 139 N. E. 234, 26 A. L. R. 1312; *Pennsylvania R. R. v. Bellinger,* 101 N. Y. Misc. Rep. 105, 166 N. Y. Supp. 652; *Battle v. Atkinson,* 9 Ga. App. 488, 71 S. E. 775, and 11 Ga. App. 837, 76 S. E. 597; *N. C. & St. L. Ry. v. Tennessee Mill Co.,* 143 Tenn.

237, 227 S. W. 443; *Central of Geo. Ry. Co. v. Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 64 So. 202.

Under the Hepburn Act a carrier must collect its charges only in money. It may not collect a greater or less *or different* compensation than the rates, etc., specified in its tariffs (*Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467). A carrier may not accept a release of damages in payment of transportation charges (*Union Pacific Ry. Co. v. Goodridge*, 149 U. S. 680). Nor any medium other than cash (*N. Y. Central R. R. v. Gray*, 239 U. S. 583; *State v. Union Pacific R. R. Co.*, 87 Neb. 29, 126 N. W. 859, 31 L. R. A. [n. s.] 657).

This principle precludes payment of a carrier's charges by offsetting claims against them, whether in or out of court. And the provisions of the California Code with reference to pleading counterclaims are immaterial, since this is a federal question and a state practice in conflict with federal law cannot prevail (*Jewell Car Co. v. Kirkpatrick Construction Co.*, 107 Fed. 622; *Sligo Furnace Co. v. Dalton*, 255 Fed. 532; *U. S. v. Robson*, 34 U. S. [9 Pet.] 319; *Mexican Central Ry. Co. v. Pinkney*, 149 U. S. 194; *Luxton v. North River Bridge Co.*, 147 U. S. 337; *Poindexter v. Greenhow*, 114 U. S. 270).

No contract, however fair, can be permitted under which the carrier's charges are paid in anything other than money. Cases such as *Battle v. Atkinson*, 9 Ga. App. 488, 71 S. E. 775, are unsound and cannot be reconciled with the

views of this Court expressed in *Chicago I. & L. Ry. Co. v. U. S.*, 219 U. S. 486.

The possibility of collusion is not the only reason for denying shippers this right. Collusion is not necessary to sustain a prosecution for rebating (*U. S. v. Koenig Coal Co.*, 270 U. S. 512). If shippers may plead counterclaims, the difficulty of collecting undercharges will be greatly increased, especially where amounts are small; and as a practical matter the policy of the law will be defeated, even if there is no collusion.

The Transportation Act of 1920 (U. S. Code, Title 49, Section 3, Subsection 2) prohibits the delivery of freight until tariff charges have been paid, except under such rules and regulations as the Commission may prescribe to insure prompt payment of rates and charges and prevent unjust discrimination. The Commission has permitted extensions of credit in some cases not exceeding ninety-six hours (*In re Section 3 of the Interstate Commerce Act as amended by Section 405 of the Transportation Act of 1920*, 57 I. C. C. 591). The assertion by a shipper of the right to counterclaim is inconsistent with this section of the Transportation Act and with the regulations of the Commission under this act. For a shipper to be allowed to assert a counterclaim in such cases will have the effect of enabling a shipper indefinitely to postpone the collection of the carrier's charges.

ARGUMENT.

Review of Conflicting Authorities.

This case presents squarely a question of importance to all railroads engaged in interstate commerce, and one which has heretofore been uncertain and the subject of divergent views on the part of such courts as have had occasion to pass upon it.

The first reported decision in which the point was passed upon by any court appears to have been the case of *Illinois Central R. R. Co. v. William L. Hoopes & Sons*, 233 Fed. 135, in which District Judge Wade of the District Court of Iowa, Davenport Division, held upon the authority of *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, and *Chicago, Indianapolis and Louisville Ry. Co. v. U. S.*, 219 U. S. 486, that a railway company cannot accept any compensation other than cash for interstate transportation; that to permit a shipper to counterclaim when sued for the collection of freight charges would, in effect, open the door to the granting and receiving of rebates; and that it was against public policy to permit a counterclaim of this kind to be pleaded. In the same volume of the Federal Reporter, at page 716, appears the case of *Chicago and North Western Ry. Co. v. William S. Stein*, in which case District Judge Munger of the District Court for the District of Nebraska, Lincoln Division, reached a like conclusion upon the authority of the same two decisions of this Court, and held that as carriers cannot accept anything but cash in payment for transportation, and as no contract, however fair, looking to the pay-

ment for such services by any exchange of commodities can stand, the public policy evinced by the law required the denial of the right to set off, leaving the shipper to enforce by independent action any rights he might have.

The *Hoopes* case was cited with approval upon another point by the Circuit Court of Appeals for the Fourth Circuit in *Lake and Export Coal Corporation v. Chesapeake & Ohio R. R.*, 1 Fed. (2nd) 968.

The case of *Johnson-Brown Co. v. Delaware, Lackawanna & Western R. R.*, 239 Fed. 590, was one in which the shipper attempted, in equity, to compel an equitable set-off against a carrier's charges of a claim for damages to goods shipped. The Court erroneously held that under the Carmack Amendment only the initial carrier might be sued, and, with reference to the point here involved, held, on the authority of the *Stein Co.* and *Hoopes* cases, *supra*, that, as freight could only be paid in cash, set-offs would open the door to fraud and discrimination.

Upon the authority of these three cases, a like result was reached in *Delaware, Lackawanna & Western R. R. Co. v. Henry Nuhs*, 93 N. J. Law 309, 111 Atl. 223, and in *Bush v. Keystone Driller Co.*, 199 S. W. 597, appears a dictum to the same effect, based on the authority of the *Hoopes* and *Stein Co.* cases. To the same effect also is the case of *Adams Express Co. v. Albright Brothers*, 75 Pa. Sup. Ct. 410. In *New York, Susquehanna and Western R. R. v. Ruthven*, 88 Pa. Sup. Ct. 501, the question was referred to and the conflicting decisions cited, but the Court expressly declined to go into the question and de-

cided the case upon another point rendering it unnecessary to pass upon this question.

In *Pennsylvania R. R. v. South Carolina Produce Association*, 25 Fed. (2nd) 315, decided by the United States District Court for the Eastern District of South Carolina, it was held that a shipper sued for freight charges could not plead a set-off or counterclaim upon the ground that it was unlawful for a railroad to accept in payment of its charges a release of a claim for damages, or to collect its freight charges in something other than money, and that this could no more be done in court than out of court.

On the other hand, Judge Mayer, in the District Court for the Southern District of New York, in *Wells Fargo Co. v. Cuneo*, 241 Fed. 727, declined to follow the *Stein Co.* and *Hoopes* cases and held that in such actions set-offs and counterclaims were pleadable. He referred to the policy of the law to settle germane disputes in one litigation and concluded that two actions should not be required where the controversy could be disposed of in one. It may be remarked, in passing, that in this *Cuneo* case the Court erroneously assumed that the mere fact that delivery of goods for shipment imports, under the Interstate Commerce Act, as a matter of law, an absolute promise to pay freight charges, and that an agreement to the contrary was void. This was pointed out by this Court in a note appended to the case of *Louisville & Nashville R. R. v. Central Iron Co.*, 265 U. S. 59, at page 69; so that, upon this other point, the *Cuneo* case has been disapproved by this Court.

In *Chicago and North Western Ry. Co. v. E. C. Tectonius Manufacturing Co.*, 262 Fed. 715, Judge Geiger of

the Eastern District of Wisconsin, after referring to the conflict of authority, held that to permit a shipper, upon being sued for freight charges, to counterclaim or set off a claim for damages, did not violate the principle of the *Mottley* case. To the same effect also is the case of *Payne v. Clark*, 271 Fed. 525, a decision by Judge Bledsoe of the District Court for the Southern District of California, Southern Division. In the latter case the Court was evidently influenced by the provisions of Section 439 of the Code of Civil Procedure of California, which provides:

> "If the defendant omits to set up a counterclaim upon a cause of action arising out of the transaction set forth in the complaint as a foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor";

also by Section 440 of the California Code, which provides:

> "When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

In *New York Central R. R. v. Federal Sugar Refining Co.*, 201 App. Div. 467, 194 N. Y. Supp. 467, the New York Appellate Division was of the opinion, upon the authority of the three cases last cited above, that a counterclaim might be pleaded. This case was, however, reversed by

the New York Court of Appeals upon another point in an opinion which did not refer to the question whether a counterclaim might be pleaded (*New York Central R. R. v. Federal Sugar Refining Co.*, 235 N. Y. 182, 139 N. E. 234, 26 A. L. R. 1312).

In *Pennsylvania R. R. v. Bellinger*, 101 N. Y. Misc. Rep. 105, 166 N. Y. Supp. 652, a New York lower court at *nisi prius*, cited and declined to follow the *Stein Company* and *Hoopes* cases, and held that in such an action a counterclaim might be pleaded under the authority of Section 501 of the New York Code of Civil Procedure, and referred to the argument to the contrary set out in these cases as "the theoretical objection set forth in the above-mentioned federal cases." This New York Court cited and followed the cases of *Battle v. Atkinson*, 9 Ga. App. 488, 71 S. E. 775, and 11 Ga. App. 837, 76 S. E. 597, in which the Georgia Court, although referring to the *Mottley* case and cases to the same effect, held, without referring to any authorities on the precise point here involved, that there was nothing in the law to forbid recoupment or set-off in such cases.

The Supreme Court of Tennessee, in *N. C. & St. L. Ry. v. Tennessee Mill Co.*, 143 Tenn. 237, 227 S. W. 443, said that it preferred to follow the cases permitting a defendant to plead such a counterclaim, "there being no decisions in the higher federal courts."

In *Central of Georgia Ry. v. Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 64 So. 202, there is a dictum in which the Court refers to the provision of the Alabama Code pro-

viding for set-off of mutual debts, whether liquidated or unliquidated, and then says that the Court knows of no reason why such a set-off should not be as available to a shipper when sued by a carrier for freight charges as when sued by it for any other debt or demand; but this Alabama Court adds the qualification that such suit be of such character as is cognizable before the state courts and not one cognizable only before the United States courts or the Interstate Commerce Commission.

The most recent case on the subject is that of *Chicago, M. & St. P. Ry. Co. v. Pioneer Grain Corp.*, 26 Fed. (2nd) 90, in which Judge John Sanborn of the District Court of the District of Minnesota, Fourth Division, permitted a counterclaim to be pleaded in such an action, saying that, at best, the question was a very doubtful one, and that if, after trial on the merits, the defendant should prevail with respect to the counterclaim this question could be finally settled on appeal.

UNDER THE HEPBURN ACT A CARRIER MUST COLLECT ITS CHARGES ONLY IN MONEY.

In *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, *supra*, this Court had occasion to construe the clause in the statute which prohibits any carrier subject to the act from demanding, collecting or receiving "a greater or less or different compensation" than the rates, fares and charges specified in the tariff. This Court in that case held that a carrier might not issue an annual pass to one not within the excepted classes, although prior to the passage of the Interstate Commerce Act the carrier had made a

settlement, lawful at the time when made, of a claim for personal injuries under which, in consideration of a release of the claim, the carrier contracted to issue an annual pass each year to the injured claimant during the latter's lifetime. This Court, after pointing out that the words "or different" could not be regarded as superfluous or meaningless, said, among other things (at p. 476):

> "In our opinion, after the passage of the commerce act the railroad company could not lawfully accept from Mottley and wife any compensation 'different' *in kind* from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way without producing the utmost confusion and defeating the policy established by the acts regulating commerce."

In *Union Pacific Ry. v. Goodridge,* 149 U. S. 680, the action was for triple damages under a statute of Colorado for alleged unjust discrimination in freight rates on coal. One of the defenses was that the shipper who was alleged to have received a rebate had had a claim against the Railway Company for unliquidated damages due to the Railway Company's negligence in breaking into a coal mine and setting it on fire, and it was contended that the alleged rebate was in consideration of the release of this claim. This Court said of this defense (at p. 691):

"To hold a defense thus pleaded to be valid would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages which it would be difficult, if not impossible, to disprove. For instance, under the defense made by this company, there is nothing to prevent a customer of the road who has received a personal injury from making a claim against the road for any amount he chooses, and, in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported."

Railroad charges may not be paid in anything but money; they may not be paid in property or services; they may not be paid by releasing damage claims against the carrier, or any medium other than cash. (See *N. Y. Central R. R. v. Gray*, 239 U. S. 583; *State v. Union Pacific R. R. Co.*, 87 Neb. 29, 126 N. W. 859, 31 L. R. A. [n. s.] 657.)

THE ABOVE PRINCIPLE PRECLUDES PAYMENT OF THE CARRIER'S CHARGES BY OFFSETTING CLAIMS AGAINST THEM, WHETHER IN OR OUT OF COURT.

It would scarcely be contended that out of court a shipper could offset a demand for an undercharge with a claim for damages. Indeed, this is inferentially recognized in

the *Cuneo* and *Tectonius* cases, *supra*. In the *Cuneo* case the Court said (241 Fed. 727, at p. 730):

> "It may well be that the parties cannot compromise out of court, but I need not pass on that question."

In the *Tectonius* case the Court intimated that no compromise could be permitted. Yet the Court there permitted the defendant to plead a set-off and counterclaim, the effect of which was to bring about in court the payment of the carrier's charges in something else than money, viz., the offsetting against such charges of a claim for loss and damages to freight. The result was, therefore, that what was forbidden outside of court was permitted in court.

Upon sound principle, the rule that a carrier's charges must be paid only in money extends to the assertion in court of the right to pay such charges by offsetting a counterclaim against them. As pointed out by Judge Munger in the *Stein* case, *supra*, if such set-off is permitted the Court must prevent the usual right to make compromises of such suits and undertake "the impossible task" of holding the carrier to diligence and good faith in presenting its defense to such counterclaim. Even in the contrary case of *Payne v. Clark*, 271 Fed. 525, *supra*, in which the shipper was allowed to plead a counterclaim, Judge Bledsoe recognized that in order that the public policy involved might be best maintained, "the trial court would be unusually astute to see that every item of dam-

age claimed was bottomed upon persuasive proof." And in the case of *Pennsylvania R. R. Co. v. Bellinger,* 101 N. Y. Misc. Rep. 105, 166 N. Y. Supp. 652, *supra,* the Court said that,

> "in order to prevent a possible discrimination or rebating, it may be incumbent upon the courts to see to it that the action is properly prosecuted to judgment."

The case at bar comes up from the same district as that in which the case of *Payne v. Clark, supra,* was heard. The fact that, in each case, if a federal question were not involved, the California Code would bar the defendant from the assertion of a claim not pleaded by way of set-off or counterclaim has, of course, no bearing, since it is well settled that the Conformity Act does not extend to the application of a rule of state practice which is in conflict with federal law (*Jewell Car Co. v. Kirkpatrick Construction Co.,* 107 Fed. 622; *Sligo Furnace Co. v. Dalton,* 255 Fed. 532; *U. S. v. Robson,* 34 U. S. [9 Pet.] 319; *Mexican Central Ry. Co. v. Pinkney,* 149 U. S. 194; *Luxton v. North River Bridge Co.,* 147 U. S. 337; *Poindexter v. Greenhow,* 114 U. S. 270).

Even the cases holding that counterclaims may be pleaded recognize that compromises of such claims for damages so pleaded probably should not be permitted; that out of court shippers may not pay their freight charges with damage claims, and that where such counterclaims

are pleaded the Court must take it upon itself to see that they are defended in good faith. The problem is soundly analyzed and discussed by Judge Wade in the *Hoopes* case (233 Fed. 135, at p. 136):

> "I am in full accord with these views expressed by Judge Munger. It is the duty of the carrier to collect all freight charges and, where necessary, to commence actions to enforce payment. To perform this duty it is necessary that the carrier shall commence action in the district where the shipper resides. Carriers are often compelled to maintain actions in districts, and even in states, far removed from the district in which suits could be maintained against them. Very often the suits are for small amounts, and if the shipper can, by counterclaim, acquire jurisdiction of the carrier in an action for damages to freight, he can force the carrier to spend much more in prosecuting its action for freight charges than the freight charges amount to.
>
> "A few years ago the nation was startled when it was found that favorite shippers were getting rich upon the rebates granted by carriers. One of the devices used in granting such rebates was for the shipper to make a fictitious claim for damages to freight, which was promptly allowed. To permit counterclaims in these actions for freight charges would simply open the door to a renewal of this method of rebate; at least, it would cast suspicion upon the transactions—especially in every case where a compromise was effected. Compromises are favored in law. If the defendant in this action has a valid claim for damages, both parties should be permitted to exercise their right to compromise the action, but,

if such compromise were effected in a transaction involving the collection of freight charges, the Court would be compelled to supervise it with the utmost care, in order, as Judge Munger expresses it, 'to prevent the granting and receiving of rebates by insidious agreement between the parties.'

"So important is it that the collection of freight charges should be uniform as to all shippers, so important is it that it be above suspicion of favoritism, that I feel that it is against public policy to permit a counterclaim of this kind to be pleaded, and the counterclaim will be stricken out."

The case against allowing counterclaims to be pleaded in this class of actions is also well stated in *Pennsylvania R. R. Co. v. S. Car. Produce Co.*, 25 Fed. (2nd) 315, *supra*, wherein the Court, after pointing out that the decisions were in irreconcilable conflict, said that the principles laid down by this Court furnish a sufficient and logical guide by which to reach a correct solution of the question; and after citing the *Mottley* case and the case of *Chicago, Indianapolis and Louisville Ry. Co. v. U. S.*, 219 U. S. 486 (wherein it was held that, even though the money value of the transportation furnished was equal to the advertising furnished, the railroad was not authorized to accept as compensation anything but money for its charges and so could not issue transportation in exchange for advertising), the Court reasoned from these decisions that no counterclaim or set-off was permissible, saying (25 Fed. [2nd] 315, at 317):

"The policy of the act of Congress in question is, as has been stated by the Supreme Court, to prevent discrimination and to cut up, root and branch, the practice of discriminating by means of rebates and allowances of claims for damages. It is clear, under these decisions, that, in order to effect that purpose, a railroad company is bound to collect its freight charges in money only, and cannot lawfully, in collecting such charges, allow a claim for damages as a set-off. If a railroad accepts in payment of these charges, either in whole or in part, a release of a claim for damages, it certainly, under the decisions of the Supreme Court, has not collected its charges in money only, and this is especially true where the claim is for unliquidated damages, as in the case at bar. The two transactions must be treated absolutely as independent and separate transactions, in order to effectuate the purpose of the act. To allow the railroad company to offset these claims for damages would be opening the door to the very practices which it was the intention of Congress to prevent.

"This much, it seems to me, is clear and settled. Now, can the parties, by setting up the claim for damages as a counterclaim in a suit brought to collect the charges, do in court what they would have no lawful right to do out of court? It seems to me that the answer must be in the negative. There would be the same opportunity to evade the act in the one case as in the other, unless the courts should undertake in every case of that sort to supervise the transaction and ascertain whether or not there was any purpose to evade the act. This is a burden which I do not think the courts should assume, nor do I think that Con-

gress intended that they should assume it. The parties have no more right to do in court, and under the supervision of the Court, what they could not by agreement do outside of the court. The act of Congress was intended to be all-embracing and to remove every opportunity, as far as possible, on the part of the railroad to allow these claims to be offset.

"No one is deprived of any right by this construction of the statute. The railroad company is still at liberty in these cases to collect its freight. It is also at liberty, provided it treats the transaction separately and apart from any question of the freight charges, to agree with the shipper for a settlement of the claim for damages. So, likewise, the railroad company has the right to bring its suit for the recovery of its freight charges, and the shipper may bring his separate, independent suit for damages. But any effort to connect the two transactions and make the settlement of one in any way dependent upon the other is contrary to the purpose of the act. This may seem to be a harsh rule, perhaps a technical one, and at times to work inconvenience and hardship. But these matters, as I have said, must give way to the broader and greater purpose of Congress to prevent the greater evils of rebates and discrimination.

"I am constrained, therefore, to hold that the counterclaim cannot be interposed in this case, but relief must be sought by a separate, independent action and an appropriate order sustaining the demurrer will be duly entered."

In the cases to the contrary the argument is made that if the parties intend to evade the statute by an unlawful

compromise, they can do it just as easily in two actions as in one. In other words, the argument seems to be that because it may be possible, in a suit by a shipper to recover for loss of or damage to freight, for the parties to effect a collusive compromise; or, for that matter, without suit, it may be possible for a carrier to collude with a shipper and pay him a rebate disguised as a fictitious claim for loss and damage; therefore counterclaims and set-offs should be pleadable in this class of cases, apparently on the theory that the danger of rebating as a result of permitting such offsets to be pleaded is no greater than if this were not permitted. This possibility of collusion, even if set-offs and counterclaims are not permitted, seems to have impressed Judge Geiger in the *Tectonius* case; but if the argument were sound, then it would be equally sound in a situation such as that in *Chicago, Indianapolis and Louisville Ry. Co. v. U. S.*, 219 U. S. 486, *supra*. In such a case the parties conceivably might make a collusive arrangement under which the railroad would pay an exorbitant price for the advertising, and then the person furnishing the advertising could buy transportation at the regular rates. Moreover, since Congress has forbidden payment of the carrier's charges in anything other than money, it is immaterial that some possibility of abuse remains even if a shipper may not plead a counterclaim. There is no warrant for disregarding the mandate of Congress merely because every possible avenue of abuse has not been closed. As

a practical matter it is a deterrent to collusion between the shipper and carrier to forbid all such arrangements, whether to pay the carrier's charges in services, property, advertising, or the release of damage claims. This Court recognized this in the case last cited, the principle of which is equally applicable in the case at bar.

In *Battle v. Atkinson*, 9 Ga. App. 488, 71 S. E. 775, *supra*, the argument is made that a shipper who owed four hundred dollars in freight charges and who sued the carrier for loss and damage and recovered twelve hundred dollars and collected from the carrier in settlement of the judgment twelve one-hundred-dollar bills, might take four of those bills and pay the carrier its claim for freight charges, and would not thereby be doing anything contrary to the letter or spirit of the law; and, therefore, the Court argued, if the same shipper were sued by the carrier for those freight charges that shipper should be permitted to plead his claim as a set-off or counterclaim, as, if recovery were had, that would be merely a case of striking a balance between the parties and rendering a judgment that would finally end the controversies pending between the parties. If this argument were sound it would be applicable to the situation which this Court had before it in the case of *Chicago, Indianapolis and Louisville Ry. Co. v. U. S.*, 219 U. S. 486, *supra*. The conclusion of the *Georgia* case is plainly unsound under the decision of this Court in the case last cited. If the carrier should undertake to issue four hundred dollars worth of trans-

portation in payment of a perfectly valid claim against the carrier far exceeding that four hundred dollars, the issuance of such transportation would be plainly illegal, notwithstanding the fact that if the carrier paid the claimant twelve hundred dollars in cash in settlement of a valid claim for that amount, that claimant might then use four hundred dollars of that amount with which to purchase transportation.

The cases which sustain the right to set-off and counterclaim stress the alleged "inconvenience" of requiring the parties to resort to two lawsuits when, by allowing set-off and counterclaim, the whole dispute can be disposed of in one. This is an argument which should be addressed to Congress, not to the courts. The argument also ignores the fact that the right to set-off and counterclaim is wholly unknown to the common law (except to the limited extent that recoupment was permitted at common law).

The courts which permit counterclaims and set-offs to be pleaded in such cases emphasize this argument of convenience and attempt to minimize the danger of violation of the Hepburn Act or of possible rebating. Any rebate, however slight, is a violation of the law. The policy of the law is just as much opposed to a small rebate as a large one. Congress has prohibited *all* departures from the published tariffs—not all except minor departures. Congress has provided that a carrier may not in any case accept *any different compensation* from one patron than from another. The evils of rebating are not to be com-

promised with. There is no room, under the policy of Congress, for the application of any equitable considerations in particular individual cases of apparent hardship or inconvenience.

The policy of the law is so plain that the criminal sections of the law apply even where there has been no collusion and the carrier has not been a party to the arrangement whereby a particular shipper fraudulently obtains a favor from a carrier (*U. S. v. Koenig Coal Co.*, 270 U. S. 512). As a practical matter, where through a mistake an undercharge results, there is always some danger of discrimination and rebating even where there is no collusion. This is so because of the difficulty in many cases of enforcing the collection of small sums. If shippers can in such cases plead set-offs and counterclaims, the collection of undercharges will necessarily be seriously jeopardized and made far more difficult in all cases where it is necessary for a carrier to sue for an undercharge. Undercharges are usually small in amount and collection is difficult in many cases. Many shippers who would not file claims, or who would not bring suit on claims, will, when sued for undercharges, be permitted to plead counterclaims which have no merit, but which will have the practical effect of interfering with the collection of undercharges. This possibility, more important in most cases as a practical matter than the possibility of opening the door to collusive rebates, seems not to have been considered by any of the courts that have had occasion to consider the question, and

we respectfully urge its consideration herein, not in connection with the construction of the act itself, but in answer to the "argument of convenience" which has impressed some of the courts before whom the question has been presented. No "argument of convenience" can justify reading an exception into the plain, unambiguous language of the act, but, even if this were permissible, the true argument of convenience tends to the contrary conclusion.

In the Transportation Act of 1920 (U. S. Code, Title 49, Section 3, Subsection 2) it is provided:

> "From and after July 1, 1920, no carrier by railroad subject to the provisions of this act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination" (41 Stats. 479; U. S. Code, Title 49, Ch. 1, Sec. 3, Sub. 2).

Under this section it is mandatory for the carrier promptly to collect freight charges in all cases. No exception based on loss or damage to the shipment is made. Charges must be paid, and at once.

Pursuant to the authority given in this statute, the Interstate Commerce Commission has permitted short extensions of credit, in certain cases, where shippers file a bond for security, but even in such instances payment of charges must be kept upon what is substantially a cash basis (*In*

re Section 3 of the Interstate Commerce Act as amended by Section 405 of the Transportation Act of 1920, 57 I. C. C. 591). In no case is a delay in payment permitted beyond ninety-six hours. All charges are required by law to be paid within that time.

In view of this fact, the assertion by a shipper of the right to counterclaim for damages and so resist payment of his freight charges will necessarily prevent the prompt collection of such charges, notwithstanding the duty, under this statute, to pay at once. If the shipper fails to pay promptly, he has violated the law. If the courts are to allow him to counterclaim in judicial proceedings they will, in effect, be placing their stamp of approval upon a prior violation of the law, and will still further encourage such practices. All that will be necessary in any case for a shipper to compel the indefinite extension of credit by a carrier, notwithstanding the clear policy of Congress as expressed in this act, will be for the shipper to assert a counterclaim and thus indefinitely postpone the actual collection of the carrier's charges, even should the shipper not prevail on his counterclaim.

For the foregoing reasons, we submit that the question certified by the Circuit Court of Appeals should be answered "yes."

Respectfully,

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